No. 20-222

IN THE

Supreme Court of the United States

GOLDMAN SACHS GROUP, INC., *ET AL.*,

Petitioners,

v.

ARKANSAS TEACHER RETIREMENT SYSTEM, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN AND PUBLIC CITIZEN FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Public Citizen and Public Citizen Foundation (collectively, Public Citizen) are nonprofit consumer advocacy organizations with members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents its members' interests in litigation and as amicus curiae.

Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for both individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process. Class actions have historically played a vital role in civil rights cases, consumer cases, and, of particular relevance here, securities fraud cases.

At the same time, Public Citizen has long recognized that class actions may be used to the detriment of absent class members and defendants in circumstances where the requirements of Federal Rule of Civil Procedure 23 are not satisfied. The interests of both named and absent class members, defendants,

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[1] Pursuant to Rule 37.6 of this Court, amici curiae state that this brief was not written in whole or in part by counsel for a party and that no one other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for both parties have consented in writing to its filing, through blanket consents filed with the Court.

the judiciary, and the public at large are best served by adherence to the principles incorporated in Rule 23. These principles are in turn informed both by the Due Process Clause and by the considerations of fairness and efficiency that led to the creation of the modern version of Rule 23 in 1966 and to the many refinements of the Rule that have occurred since then. Public Citizen has sought to advance this view by participating, either as counsel or amicus curiae, in many of this Court's decisions that are relevant to the issues posed by this case, including *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), and *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). Public Citizen believes that the submission of this brief may be similarly helpful to the Court in resolving this case.

SUMMARY OF ARGUMENT

The court of appeals correctly rejected Goldman Sachs's argument that class certification is barred "as a matter of law" in cases alleging misstatements that are "generic" in nature. Goldman argued below that generic statements are incapable of having price impact as a matter of law because, in Goldman's view, no reasonable investor would rely on such statements. As the Second Circuit recognized, accepting Goldman's approach would inject a determination of the common issue of materiality into the class-certification decision, contrary to this Court's decisions interpreting Rule 23.

A categorical rule precluding class certification because of the assertedly generic nature of a misstatement would both misconstrue Rule 23(b)(3)'s

predominance requirement and overrule *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), which held that arguments that an alleged misrepresentation is immaterial may not be resolved at the certification stage. Whether the generic nature of a misstatement renders it incapable as a matter of law of influencing a reasonable investor is an objective question that can be resolved on a classwide basis. Thus, the inquiry is one of the common questions that predominates in a securities-fraud class action, and the claims of the class rise or fall depending on how it is resolved. Because the generic nature of a misstatement does not bear on whether any one plaintiff is differently situated from another, it is not a pertinent consideration at the certification stage.

A court may consider *evidence* regarding the generic nature of a misstatement at the certification stage only to the extent that such evidence bears on the existence and predominance of common issues meriting classwide resolution. Such evidence may, for example, be relevant to determining whether the defendants have rebutted the presumption of classwide reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), by showing that the alleged misrepresentations had no price impact. If defendants adduce factual evidence showing the absence of price impact for a generic misstatement, the court may consider that evidence, along with other evidence, in the court's assessment of price impact.

Below, the lower courts did *not* bar presentation of such evidence: They considered and rejected Goldman's evidence that the fall in its stock price was attributable to the news of government enforcement actions against Goldman, rather than to the revelation

that its supposedly generic statements about its conflict-of-interest policies and practices were false. By contrast, the lower courts properly rejected Goldman's request that they resolve at the certification stage the question whether the statements were too generic to influence a reasonable investor—that is, the common question of materiality that *Amgen* held may not be considered at the certification stage.

Although Goldman contends that the decision below adversely affects defendants through increased pressure to settle, adopting Goldman's rule would impose greater costs on the courts and both parties. Requiring plaintiffs to prove, at the certification stage, that they will prevail on common merits issues in their case would expand the scope of pre-certification proceedings and burden the courts and the parties with what would amount to two trials on the merits. Further, shifting the resolution of merits questions to the certification stage would undercut Rule 23's goals of efficiency, fairness, and repose. Even if a defendant prevailed on a merits issue common to the class, the resolution of that issue would not bind members of the putative class and accordingly would not protect the defendant against successive suits.

ARGUMENT

I. The "generic" nature of a misstatement does not bar class certification.

The decision below correctly rejected Goldman's argument that the generic nature of a misstatement bars class certification because generic misstatements "are incapable of impacting a company's stock price as a matter of law," Pet. C.A. Br. 46. The United States, in an amicus brief filed in support of neither party, agrees with the court of appeals that adopting

Goldman's categorical rule would be improper as a *substantive* matter: Generic statements are not necessarily insignificant to reasonable investors. U.S. Br. 17.

Goldman's argument is also incorrect for a more fundamental reason: Even if generic misstatements were incapable of affecting the choices of reasonable investors, that proposition would be irrelevant to the certification inquiry. Rule 23(b)(3) certification depends on the existence of common issues that predominate over individual questions. Whether a statement is incapable as a matter of law of impacting stock prices because it is too generic to be relied upon by a reasonable investor—that is, whether the statement is *immaterial*—is itself one of the common merits questions that a class action exists to resolve. A categorical rule precluding class certification because of the generic nature of a misstatement would contravene well-settled principles of class-action law and overrule *Amgen*'s holding that "plaintiffs are not required to prove materiality at the class-certification stage" because "they need not, at that threshold, prove that the predominating question will be answered in their favor." 568 U.S. at 468.

A. At the certification stage of a securities-fraud class action, the critical question is whether common issues predominate.

Federal Rule of Civil Procedure 23 sets forth the requirements for class certification. In addition to satisfying Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, the plaintiffs also must satisfy the requirements of one of the "types of class actions" specified in Rule 23(b). Fed. R. Civ. P. 23(b) (providing that "[a] class

action may be maintained if Rule 23(a) is satisfied and if" one of the Rule 23(b) subdivisions is met). Where, as here, the plaintiffs seek certification under Rule 23(b)(3), the district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members" (the predominance requirement) and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (the superiority requirement). Fed. R. Civ. P. 23(b)(3).

Rule 23(b)(3)'s predominance requirement "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Amgen*, 568 U.S. at 469 (internal marks and citation omitted). Rather, "[w]hat the rule does require is that common questions *predominate* over any questions affecting only individual class members." *Id.* (internal marks omitted). "[A] common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal marks omitted). If questions affecting only individual class members do not "overwhelm common ones," *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014) (*Halliburton II*), the class is "sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

"Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) *(Halliburton I*). Thus, the court must consider the substantive legal standards applicable to

the plaintiffs' claim. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (explaining that certification is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action" (internal citation omitted)); *Amchem*, 521 U.S. at 623 (stating that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy"). At this stage, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466.

Many of the elements of a securities-fraud claim under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b–5, 17 C.F.R. § 240.10b–5(b), are by nature common to all potential class members.[2] For example, the answer to the question whether the defendants made a false or misleading statement or omission is the same for all potential class members. The question of scienter—whether the defendants acted with the "required state of mind," *Tellabs, Inc. v. Major Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007)—similarly has a singular, classwide answer. Likewise, because the question of the materiality of a misrepresentation or omission "is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor,"

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[2] The elements of a securities-fraud claim alleging violations of section 10(b) and Rule 10b–5 are "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Halliburton I*, 563 U.S. at 810 (internal quotation marks and citation omitted).

its answer does not vary among potential class members. *Amgen*, 568 U.S. at 467–68 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976)). The very *existence* of those questions justifies certification, which enables their resolution on a classwide basis. But their resolution is not proper at the certification stage; rather, whether plaintiffs will succeed or fail on common questions is the inquiry at the merits stage.

The element of reliance on a misrepresentation is different. The reliance element "ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury." *Halliburton II*, 573 U.S. at 267 (quoting *Amgen*). Whether investors relied on a particular misrepresentation or omission in determining whether to engage in a securities transaction is not always a question capable of classwide resolution. In circumstances where the element can be established only by proof of individual investors' direct reliance on a misrepresentation, "individual issues [of reliance] then would overwhelm the common ones, making certification under Rule 23(b)(3) inappropriate." *Id.* at 268 (quoting *Amgen*).

In *Basic Inc. v. Levinson*, 485 U.S. at 247, however, this Court held that plaintiffs may prove the reliance element without individualized proof "by invoking a rebuttable presumption of reliance, rather than proving direct reliance on a misrepresentation." *Halliburton II*, 573 U.S. at 268. The so-called *Basic* presumption of reliance provides that "if a market is shown to be efficient, courts may presume that investors who traded securities in that market relied on public, material misrepresentations regarding those securities," *Amgen*, 568 U.S. at 462, through the investors' "reliance on the integrity of the price set by the market,"

id. (internal citation omitted). The *Basic* presumption comprises two distinct presumptions:

> First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price. Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation.

Halliburton II, 573 U.S. at 279. This Court derived the *Basic* presumption from the fraud-on-the-market theory, which posits that "the market price of shares traded on well-developed markets reflects all publicly available information, and hence, any material misrepresentations." *Id.* at 268 (quoting *Basic*, 485 U.S. at 246).

Under *Basic*, the existence of an efficient market that incorporates public, material information into a security's price allows a court to treat reliance as a common question, and hence to find that the predominance requirement is satisfied. *See Halliburton II*, 573 U.S. at 276. By invoking the *Basic* presumption, plaintiffs may proceed with an action where questions common to the class—not only the question of reliance, but also the other common questions of materiality, falsity, scienter, and causation—can be answered cohesively, for all members of the class.

The *Basic* presumption is "just that": a presumption. *See Halliburton I*, 563 U.S. at 811. It can be rebutted through appropriate evidence. *See Basic*, 485 U.S. at 248 ("Any showing that severs the link

between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance.'"). Moreover, the presumption does not determine the outcome of any particular investor's individual claim of reliance. Instead, it determines whether the question of reliance can be given a common, classwide answer—and, therefore, whether common questions predominate. Thus, as this Court held in *Halliburton II*, the *Basic* presumption may be rebutted at the certification stage by evidence that certain of its fundamental premises—including the existence of an efficient market or the price impact of the asserted misrepresentation—are not present. 573 U.S. at 280–84; *see also Basic*, 485 U.S. at 248–49 (providing examples of showings that would rebut the *Basic* presumption).

Nonetheless, the questions presented by the *Basic* presumption are relevant at the certification stage only to the extent that they are probative of "the class certification requirements of Federal Rule of Civil Procedure 23." *Halliburton II*, 573 U.S. at 284. That is, questions concerning the application of the presumption are implicated at the certification stage if their resolution "is needed to ensure that the questions of law of fact common to the class will 'predominate.'" *Id.* at 283 (quoting *Amgen*, 568 U.S. at 467). Otherwise, the resolution of common liability questions, even if interwoven to some extent with the presumption, "should be left to the merits stage, because it does not bear on the predominance requirement of Rule 23(b)(3)." *See id.* at 282.

B. An argument that a misrepresentation was too "generic" to support reliance is not a basis for denying certification.

Goldman argued below that the generic nature of its statements made them categorically incapable, as a matter of law, of influencing stock prices because a "reasonable investor" would not consider them in making trading decisions. *See* Pet. App. 19a–22a. The question Goldman asked the courts to decide at the certification stage was not just *similar* to materiality—it *was* materiality: "whether the 'reasonable investor' would have considered the omitted information significant at the time." *Basic*, 485 U.S. at 232.[3] As the Second Circuit correctly explained, Goldman's argument that class certification is barred because of the generic nature of the misrepresentations was contrary to this Court's construction of Rule 23 in *Amgen* and *Halliburton II*. *See* Pet. App. 23a–24a.

In *Amgen*, this Court explained that proof of materiality is not required for class certification in cases where plaintiffs invoke the *Basic* presumption because "such proof is not necessary to ensure satisfaction of Rule 23(b)(3)'s predominance requirement." 568 U.S. at 459, 467 n.4; *see also Halliburton II*, 573 U.S. at 282 (affirming *Amgen*'s holding that materiality "does not bear on the predominance requirement of Rule 23(b)(3)"). "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen*, 568 U.S. at 459.

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[3] *See also* Pet. App. 21a (quoting Goldman's argument that general misstatements "are incapable" of price impact "for the same reasons that those statements are *immaterial* as a matter of law (as well as fact)" (emphasis added)).

Amgen explained that proof of materiality is not necessary to satisfy Rule 23(b)(3)'s predominance requirement for two reasons. First, because "materiality is judged according to an objective standard," it is "a question common to all members of the class." *Id.* at 459; *see also id.* at 467. Second, a "failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Id.* at 468. Win or lose, the claims of the class rise or fall together as to the issue of materiality. Because the question of materiality "does not give rise to any prospect of individual questions overwhelming common ones," *id.* at 474, proof of materiality is not necessary to satisfy Rule 23(b)(3)'s predominance requirement. *Id.* at 466–70.

Halliburton II likewise explained that when "the other *Basic* prerequisites … are proved at the class certification stage"—and have not been rebutted by a showing of market inefficiency or absence of price impact—"the common issue of materiality can be left to the merits stage without risking the certification of classes in which individual issues will end up overwhelming common ones." 573 U.S. at 282. Thus, *Halliburton II* reaffirmed *Amgen*'s holding that the "discrete issue" of materiality is to be "wholly confined to the merits stage." *Id.*

The same reasoning applies here. The argument that reasonable investors would consider a generic misrepresentation insignificant to their trading decisions—like other arguments concerning materiality—raises an issue that is objective and does not depend on the individual circumstances of particular investors. Because the answer to that question is the same for everyone, it can be resolved "in one stroke," for all

members of the class. *Wal-Mart*, 564 U.S. at 350. Moreover, a negative answer to the question whether a reasonable investor would consider a generic statement significant does not leave open the possibility of different outcomes for claims of different class members: A finding that the misrepresentation would be immaterial to a reasonable investor "end[s] the case for the class *and* for all individuals alleged to compose the class." *Amgen*, 568 U.S. at 474 (emphasis added).

The argument that Goldman made below thus poses a common question fit for resolution on a class-wide basis. *Cf. Tyson Foods*, 136 S. Ct. at 1045 (a question that "is susceptible to generalized, class-wide proof" is a common one). The class is "entirely cohesive" as to the issue because the generic nature of a misrepresentation does not bear on whether any one plaintiff is differently situated from another. *See Amgen*, 568 U.S. at 460.

In other words, whether a misstatement is "too generic" to be actionable is not a question that must be answered for the court to determine *whether* the case may proceed as a class action. Rather, that question *is* one of the common questions that predominates in a class action alleging violations of section 10(b) and Rule 10b-5, and it is properly addressed on the merits, not at certification. To hold otherwise is contrary to *Amgen* and *Halliburton II*.

Indeed, *Amgen* rejected an argument identical to the one that Goldman made below. Amgen argued that class certification "must be denied" where an alleged misrepresentation is not material because such a misstatement "by definition[] would have no impact on Amgen's stock price in an efficient market." *Amgen*, 568 U.S. at 459. Just as Amgen was wrong to assert

that class certification is precluded because an immaterial misstatement lacks price impact "by definition," *see id.*, Goldman was wrong to argue below that class certification is precluded because generic misstatements "are incapable" of price impact "as a matter of law," Pet. C.A. Br. 46.

As the court of appeals recognized, the fundamental problem with the argument Goldman presented below is that it confused the issue of predominance with the merits of the plaintiffs' case. *Amgen* explained that the "pivotal inquiry" is whether common *questions* predominate over ones requiring individualized proof, 568 U.S. at 467, not whether those questions will be answered in favor of the class, *id.* at 459. If the answer to a common question is the same for all members of the class—that is, if the individual circumstances of the class members do not "bear on the inquiry"— the class "will prevail or fail in unison." *Id.* at 460. Here, even if Goldman were correct that the generic nature of a misstatement renders it immaterial and thereby incapable of price impact as a matter of law, its argument still would present a question whose answer is the same for all members of the class. And the claims of all class members will rise or fall together depending on how that question is answered. The existence of such a question is one of the central justifications for class certification, not a reason for denying certification "as a matter of law."

II. Evidence relating to the nature of a misstatement is pertinent at the certification stage only to the extent that it is relevant to assessing whether defendants have rebutted *Basic*'s presumption of reliance.

Although courts may not deny certification based on a determination that a generic misrepresentation is immaterial, they may consider the contents of the misstatements to the extent that the substance of those statements is part of the evidence relevant to whether the statements lacked price impact. *See* U.S. Br. 19–23. The parties themselves largely agree on this point. *See* Resp. Br. 20; Pet. Br. 26. Indeed, Goldman has now abandoned the argument, rejected below, that a misrepresentation's generic nature renders it legally incapable of having price impact.

Before this Court, Goldman attempts to recast its argument as one about the evidentiary significance of its statements' generic nature, rather than about whether, as a matter of law, a reasonable investor could have considered them significant. Even assuming Goldman has not waived its current argument, *see* Resp. Br. 34–36, that argument provides no basis for setting aside the judgment below. The court of appeals did *not* hold that courts are prohibited from considering the nature of a defendants' statement as part of the evidentiary mix in determining whether they in fact had price impact, and its judgment should be affirmed.

A. This Court held in *Halliburton II* that the *Basic* presumption of reliance may be rebutted at the certification stage either by evidence that the market in which securities were traded was not efficient, or by

evidence showing directly that the misrepresentation did not affect the stock price. 573 U.S. at 280–82. Absence of price impact, the Court explained, goes to *Basic*'s "fundamental premise" that a misrepresentation is among the information reflected in the stock price. *Id.* at 283 (quoting *Halliburton I*). If the misrepresentation did not affect the stock price, the plaintiffs cannot be presumed to have relied on the misrepresentation through the integrity of the stock price, for "the basis for finding that the fraud had been transmitted through market price would be gone." *Id.* at 281 (quoting *Basic*, 485 U.S. at 248). Moreover, the Court explained, courts must consider evidence concerning price impact at the certification stage because, by determining the applicability of the *Basic* presumption of reliance, such evidence bears on Rule 23(b)(3)'s predominance requirement. *Id.* at 283.

The nature of a misrepresentation (including its generality or specificity) may have evidentiary relevance to the district court's assessment of whether the defendants' misstatements in fact had no price impact. For example, a defendant might adduce evidence from an expert witness opining on an event study examining the impact that misrepresentations at certain levels of generality (or specificity) had on a company's stock price. Or a defendant "might attempt to disprove price impact through evidence that the nature of the misstatements alleged in a particular suit made them unlikely to be incorporated into the market price." U.S. Br. 22. Evidence relating to the contents of a misrepresentation—including whether they were generic or specific—thus may be considered among the total mix of evidence in the district court's assessment of price impact at the certification stage, just as other evidence bearing on price impact may be

considered in the court's factual assessment of whether the *Basic* presumption has been rebutted.

B. There is a difference between considering the contents of alleged misrepresentations as part of the evidence bearing on whether those statements *in fact* had a price impact, on the one hand, and holding categorically that assertedly generic statements were legally incapable of having price impact because a reasonable investor would not consider them significant, on the other. The latter is what Goldman advocated below, and what Judge Sullivan in dissent would have held. *See* Pet. App. 45a ("[N]o reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based.") (Sullivan, J., dissenting). But as the United States explains, the "reasonable investor" inquiry and the factual question whether particular statements *actually* affected securities prices are very different questions that may have different answers: Even in generally efficient markets, prices may at times respond to information that the objectively reasonable investor would find immaterial, and vice versa. *See* U.S. Br. 16–17.

To be sure, the nature of misstatements may have evidentiary bearing on the price-impact determination at the certification stage. For example, expert witness testimony opining that price effects were attributable to specific information that was not misrepresented, rather than to more general alleged misstatements, is fair game in a court's assessment of whether the defendants have rebutted the *Basic* presumption of reliance by showing lack of price impact. What *Amgen* holds, however, and what *Halliburton II* confirms, is that a district court must refrain from assessing the issue of materiality in the guise of price-

impact evidence at the certification stage. *See Amgen*, 568 U.S. at 459 (materiality is not a certification question); *id.* at 466 ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the class certification stage."). Only price impact—not materiality—is pertinent to Rule 23(b)(3)'s predominance inquiry. *See Halliburton II*, 573 U.S. at 282–84 (affirming *Amgen*). And this Court has made clear that "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466.

C. The decisions below carefully walked the appropriate line. Therefore, the Second Circuit's decision should neither be reversed, as Goldman advocates, *see* Pet. Br. 5–6, nor vacated for clarification, as the United States suggests, *see* U.S. Br. 20.

In its decision in Goldman's first appeal in this case, the Second Circuit (in an opinion written by Judge Wesley, who also wrote the opinion currently subject to review) explicitly held that Goldman was entitled to introduce evidence that the market did not respond to information reporting Goldman's conflicts of interests. Pet. App. 76a–78a. The court stated that the fact that this evidence "touches on materiality" did not bar its consideration at the certification stage to the extent that it was relevant to price impact. *Id.* at 77a–78a.

On remand, the district court complied with the court of appeals' directive. Goldman has not identified any evidence that it offered but the district court refused to consider. Neither Goldman nor Judge Sullivan's dissent points to any witness testimony or documentary exhibit that was inaccurately characterized

or omitted from the district court's assessment of price impact. Goldman contends that the decision below was wrong because "[i]t is simply intuitive" that a generic statement lacks price impact, *see* Pet. Br. 27, but intuition is not evidence. Perhaps a different judge would weigh the evidence differently and reach a different conclusion, as Judge Sullivan would have. But that possibility does not rise to the level of clear error. *See* Pet. App. 37a ("It might well be that were one of us given the same task as that of the district judge we would conclude otherwise; but we cannot say there can only be one conclusion from the record presented.") (majority opinion).

The court of appeals considered the district court's careful review of the record and found no clear error in the district court's determination that Goldman failed to rebut the *Basic* presumption. *See* Pet. App. 29a–32a. Nothing in the court of appeals' analysis suggests that the court silently reversed its own previous ruling and affirmed the district court based on the erroneous view that the nature of the alleged misrepresentations is irrelevant to the determination of price impact. Rather, the court of appeals correctly rejected Goldman's (and Judge Sullivan's) invitation that it decide that Goldman's statements were "too general as a matter of law," Pet. App. 37a, and thus legally incapable of affecting price because a reasonable investor would not consider them significant. That conclusion is consistent with this Court's decisions in *Amgen* and *Halliburton II* that such common merits questions going to materiality should not be decided at the certification stage. At the same time, the court of appeals did not go too far by holding that the nature of the statements must be disregarded by the district court in weighing the evidence on the factual question

of price impact. The court of appeals thus committed no reversible error, and there is nothing unclear in its reasoning that requires vacatur and remand.

III. Expanding certification determinations to require proof of merits issues undermines Rule 23's purposes.

Goldman contends that the decision below would impose on defendants "serious costs" and increased pressure to settle unmeritorious claims. Pet. Br. 35–36. To the contrary, expanding the scope of the certification inquiry to require that plaintiffs succeed on a merits issue (such as whether misstatements that are said to be generic in nature are material) would perversely *increase* the costs and settlement pressures exerted on defendants.

Requiring plaintiffs to prevail on merits issues at the certification stage would impose significant costs on the parties and increase the burden to the court. Thorough discovery would have to be taken on merits issues *before* certification of the class, increasing the scope and costs of pre-certification discovery and delaying the court's certification decision. The demands of facing an uncertified class action would increasingly approximate those of defending a certified class action. A certification hearing would replicate the trial on the merits of the class's claims, thereby increasing the costs and burdens to the parties and the resources expended by the court. The upshot would be an increase in the costs and settlement pressures on defendants *before* the certification stage.

The stakes of the certification decision also would be higher. For example, if the court were to find at the certification stage that a reasonable investor could rely on a misstatement that was assertedly too generic

in nature, the defendant would not be able to carry its burden on summary judgment on that issue. The heightened significance of the certification decision would accentuate the shift of the burden of defending the case from after the certification stage to before.

Further, requiring plaintiffs to show at the certification stage that they will prevail on the merits of their claim would undermine the principal benefits of class actions: the gains in efficiency, fairness, and repose that accrue when common issues are litigated together and yield judgments binding on plaintiffs and defendants alike. A finding at the certification stage that there was a failure of proof on the merits of the class claims would not be binding on anyone other than the named plaintiff. *See Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011) ("[I]n the absence of a certification under … Rule [23], the precondition for binding [a nonparty class member] was not met. Neither a proposed class action nor a rejected class action may bind nonparties."). A decision rejecting class certification would not even bar another plaintiff from trying to certify an identical class in a different case presenting the same claim. *See id.* at 316 (acknowledging that "under our approach class counsel can repeatedly try to certify the same class"). Shifting the determination of a merits issue to the certification stage thus would give the defendant no protection against successive suits.

As this Court recognized in *Amchem*, Rule 23(b)(3)'s objective is to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." 521 U.S. at 615 (quoting Fed. R. Civ. P. 23, Advisory

Comm. Notes to 1966 Amendments, Subdivision (b)(3)). Under *Basic*, where there is an efficient market and a public misrepresentation, plaintiffs may invoke a presumption of classwide reliance, thereby permitting the common resolution of both the question of reliance and the common questions of materiality, falsity, scienter, and causation. The considerations of fairness and judicial economy on which Rule 23 is based are best served by recognizing those common questions for what they are and permitting their resolution on the merits.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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